A

CORNELIUS JIMBANGAN

v.

JOSEPH CRISPIN & ANOR; MICHAEL PERSIUS UBU (THIRD PARTY)

B

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI JC
[SUIT NO: K22-182-2005]
21 MAY 2009

C

CIVIL PROCEDURE: *Striking out - Third party's counterclaim and defence - Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d) - Whether defendants' allegations in statement of claim baseless, malicious and defamatory - Whether matters alleged to be defamatory published on occasion of absolute privilege - Whether third party's counterclaim disclosed no reasonable cause of action and ought to be struck out*

D

This was an application by the defendants to strike out the third party's counterclaim and defence under O. 18 r. 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('the Rules'). The background facts were that the plaintiff had sued the defendants for unlawfully transferring into their names a land belonging to him. In the suit the plaintiff alleged that his signatures on the memorandum of transfer and the loan agreement were forged by the defendants. It was the defendants' case that they had never met the plaintiff in person but pleaded that all communications and dealings in connection with the purchase of the land were made through the third party, an advocate and solicitor. Hence, when the writ of summons and statement of claim were served on the defendants by the plaintiff, the defendants found it necessary to take out third party proceedings against the third party claiming to be indemnified for any loss in the event the plaintiff was successful in his suit against them. The third party counterclaimed against the defendants for damages and pleaded that the defendants' allegations in their statement of claim in the third party proceedings were baseless, malicious, defamatory and calculated to disparage him in his profession as an advocate and solicitor. The defendants on the other hand contended that the matters alleged by the third party to be defamatory were published on occasion of absolute privilege and therefore not actionable in a court of law.

E

F

G

H

I

Held (allowing defendants' application):

(1) The allegations which the third party claimed to be defamatory were all contained in the defendants' statement of claim. They were necessary to protect the defendants' interest in the face of the suit against them by the plaintiff. As such, they fell squarely within the category of absolute privilege and were therefore insulated from defamation action. Hence, the third party's counterclaim against the defendants disclosed no reasonable cause of action, was scandalous, frivolous or vexatious and was an abuse of the court process. The counterclaim (and the defence) was on the face of it obviously unsustainable and ought to be struck out with costs. (para 15)

Case(s) referred to:
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***
Castro v. Murray [1875] 10 Ex 213 ***(refd)***
Dyson v. AG [1911] 1 KB 410 ***(refd)***
Joceline Tan Poh Choo & Ors v. V Muthusamy [2003] 3 CLJ 705 CA ***(dist)***
Kennedy v. Hilliard [1859] 10 Ir CL Rep (NS) 195 ***(refd)***
Lincoln v. Daniels [1962] 1 QB 238 ***(refd)***
Royal Aquarium v. Parkinson [1892] 1 QB 431 ***(refd)***
Stern v. Piper [1996] 2 All ER 385 ***(refd)***
Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [2000] 5 CLJ 435 HC ***(refd)***
Tractors Malaysia Bhd v. Tio Chee Hing [1975] 1 LNS 133 PC ***(refd)***
Young v. Holloway [1895] P 87 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 rr. 19(1)(a), (b), (d)

For the defendants - Michael Dennis Tan; M/s Michael Denis Tan & Co
For the 3rd party - Munirah Ahmad Bashir Khan; M/s Angela Ubu & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JC:

[1] This is an application by the defendants to strike out the Third Party's counterclaim and defence under O. 18 r. 19(1)(a), (b) and (d) of the Rules of the High Court 1980 (the Rules).

[2] The background facts leading to this application are as follows. In October 2005 the plaintiff sued the defendants for unlawfully transferring into their names his land under Native Title

No. 213022827. In the suit the plaintiff alleged that his signatures on the memorandum of transfer and the loan agreement were forged by the defendants. He pleaded that it was never his intention to sell the land to the defendants, who were total strangers to him. He therefore asked for an order that the title deed of the land be returned to him and that he be reinstated as the registered owner of the land.

[3] This allegation took the defendants by surprise because to their knowledge they had at the request of the third party, who is an advocate and solicitor, given a loan of RM15,000 to the plaintiff through the third party whereby the plaintiff agreed to repay a sum of RM15,640 within six months with the land as security. It was their pleaded case that the execution of the loan agreement was witnessed by the third party. When the plaintiff failed to repay the loan despite being given an extension of time, the defendants bought over the said land for RM38,000. However only RM23,000 was paid, being the difference between the purchase price of RM38,000 and the loan amount of RM15,000. By para. 20 of the statement of claim it was pleaded that the RM23,000 was handed to the third party to be delivered to the plaintiff.

[4] The land was subsequently transferred to the defendants by way of a memorandum of transfer dated 2 November 1994 which was executed in the presence of the third party.

[5] The defendants admitted that they never met the plaintiff in person but pleaded that all communications and dealings in connection with the purchase of the land were made through the third party. By para. 19 of the statement of claim it was pleaded that although the plaintiff was not present at the time they executed the memorandum of transfer they were told by the third party that the plaintiff had signed the memorandum of transfer in his presence.

[6] On the pleadings it is obvious that the defendants had left it to the third party to do what was necessary in order to vest in them good title to the land, free from all encumbrances.

[7] Hence when the writ of summons and statement of claim were served on them by the plaintiff the defendants found it necessary to take out third party proceedings against the third party claiming to be indemnified for any loss in the event the plaintiff was successful in his suit against them. According to the defendants their action was purely to protect their interest in the

face of the suit brought against them by the plaintiff and not to defame the third party. The full particulars of the third party's alleged breaches of duty as pleaded by the defendants are as follows:

(a) Representing to the defendants that the plaintiff wanted a loan of RM15,000 with the said land as security.

(b) Failing or neglecting to pay the loan amount of RM15,000 or any part thereof to the plaintiff.

(c) Failing to attend to the proper execution of the loan agreement.

(d) Representing to the defendants that the plaintiff was willing to sell and transfer the land for the total purchase price of RM38,000 of which the balance of RM23,000 only was payable.

(e) Advising the defendants to purchase the land from the plaintiff.

(f) Failing to advise the defendants not to purchase the land and failing to advise the defendants not to proceed with the transfer of the said land to the defendants.

(g) Failing to attend to the proper execution of the memorandum of transfer.

(h) Representing that the plaintiff had executed the memorandum of transfer and duly witnessing what purported to be the plaintiff's signature on the memorandum of transfer.

(i) Failing to pay the balance of the purchase price of RM23,000 or any part thereof to the plaintiff.

(j) Attending to registration of the memorandum of transfer when the documentation was not in order.

(k) Failing to inform the defendants that the plaintiff had not executed the memorandum of transfer or that the documentation was not in order.

(l) Failing to ensure that the defendants purchased the land free from all encumbrances.

(m) Failing to ensure that there was no omission, forgery, fraud or wrongdoing committed in the execution and registration of the memorandum of transfer.

[8] As it turned out the plaintiff's claim against the defendants was dismissed by Justice Ian Chin on 25 January 2007 on the ground that his action was time-barred. In consequence the defendants' third party proceedings against the third party was also struck out as it was conceded by the defendants that their claim should be struck out in the event the plaintiff's claim was dismissed. The plaintiff was ordered to bear the costs of both proceedings.

[9] Despite the striking out of the third party proceedings the third party decided to pursue his counterclaim against the defendants for damages. His pleaded case is that the defendants' allegations in their statement of claim in the third party proceedings were baseless and that the suit was malicious and defamatory and calculated to disparage him in his profession as an advocate and solicitor. The third party claimed that the matters alleged by the defendants in their natural and ordinary meaning were understood to mean that he was unethical, untrustworthy, incompetent, reckless, negligent, and a criminal in that he had forged the signatures of the plaintiff and misappropriated the monies entrusted to him for his own benefit.

[10] The defendants on the other hand contended that the matters alleged by the third party to be defamatory were published on an occasion of absolute privilege and therefore not actionable in a court of law.

[11] The question is whether the defendants' allegations in the statement of claim are covered by absolute privilege. If so the Third Party has no cause of action against the defendants no matter how defamatory the allegations are. In *Royal Aquarium v. Parkinson* [1892] 1 QB 431 Lopes LJ said at p. 451:

> The authorities established beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognized by law, and this though the words were written or spoken maliciously, without any justification or excuse, and from personal ill will or anger against the party defamed.

[12] The rationale for this protection is explained by Pigott CB in *Kennedy v. Hilliard* [1859] 10 Ir CL Rep (NS) 195 as being 'founded on public policy, which requires that a judge in dealing with the matter before him, a party in preferring or resisting a legal

proceeding, and a witness in giving evidence, oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or prosecution for libel.'

[13] The rule of absolute privilege falls into three categories: see *Lincoln v. Daniels* [1962] 1 QB 238 where Devlin LJ said at pp. 257-258:

> This (the first) category covers all matters which are done *coram judice*. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the three to define. It is based on the authority of *Watson v. M Ewan* [1905] AC 480 in which the House of Lords held that the privilege attaching to evidence which a witness give *coram judice* extended to the precognition of proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In *Beresford v. White* [1914] 30 LTR 59 the privilege was held to attach to what was said in the course of an interview by a solicitor with a person who might or might not be in a position to be a witness on behalf of his client in contemplated proceedings.

[14] The defence of absolute privilege is recognised by the Malaysian Courts as can be seen in *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [2000] 5 CLJ 435 where James Foong J (as he then was) held:

> The submissions of defendant, however defamatory they were of the plaintiff, are protected by absolute privilege. The court accepted the submission when tendered. When this happened, the statements contained in these documents must be considered to be made in the course of legal proceedings.

[15] The allegations which the third party claims to be defamatory are all contained in the defendants' statement of claim. They were necessary to protect the defendants' interest in the face of the suit brought against them by the plaintiff. As such they fall squarely within the second category of absolute privilege mentioned by Devlin LJ in *Lincoln* and are therefore insulated from defamation action.

[16] Learned counsel for the third party cited the case of *Joceline Tan Poh Choo & Ors v. V Muthusamy* [2003] 3 CLJ 705 for the proposition that the defendants' statement of claim is not protected by privilege as it had not been read out in open court. With due

respect learned counsel has misconstrued and misapplied *Joceline Tan Poh Choo*. That case concerns the publication in the newspaper of part of the amended statement of claim which had not been read out in open court. It was for that reason that the court held that the appellant was not entitled to rely on the statutory defence of absolute privilege, not because the amended statement of claim had not been read out in open court.

[17] The point in contention in that case was whether the newspaper report should only be confined to what was publicly heard in open court and not to matters contained in documents filed in court, and not read in open court. The case of *Stern v. Piper* [1996] 2 All ER 385 was cited with approval where Hirst LJ said at pp. 394-395:

> However, I think it is significant that privilege only protects reports of proceedings taking place in open court, and that its foundation is that those proceedings took place in public so that the public in general should have access to fair and accurate reports thereof (see *Webb v. Times Publishing Co Ltd* [1960] 2 All ER 789, [1960] 2 QB 535) This is a consideration of public policy, and does not extend to court documents which have not been brought into the public arena.

[18] In the present case the question of publication of the defendants' allegations in the newspaper does not arise at all. *Joceline Tan Poh Choo* is therefore irrelevant as the facts are distinguishable.

[19] If counsel is right in her submission it would mean that litigants who file court papers for purposes of court proceedings are exposing themselves to civil and even criminal action if the contents of the documents are found to be defamatory. That of course will be contrary to the principle expounded by Lopes LJ in *Royal Aquarium* and cannot be a correct proposition of law.

[20] The law on O. 18 r. 19 of the Rules is settled. A pleading should only be struck out if it is shown that it is on the face of it 'obviously unsustainable': see *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7. In *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 1 LNS 133 Lord Diplock cautioned that the power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power and should be exercised with the utmost caution. The court will not permit a plaintiff to be ousted from the judgment seat, so to speak, except where the cause of action is obviously bad and almost 'incontestably bad': see *Dyson v. AG* [1911] 1 KB 410.

[21] If the pleading is so obviously frivolous that to advance it forward must be an abuse of the court process the claim will be struck out: see *Young v. Holloway* [1895] P 87. The court will always guard its machinery from being used as a means of vexation and oppression in the process of litigation: see *Castro v. Murray* [1875] 10 Ex 213.

[22] In my view the third party's counterclaim against the defendants discloses no reasonable cause of action, is scandalous, frivolous or vexatious and is an abuse of the court process. The counterclaim (and the defence) is on the face of it obviously unsustainable and ought to be struck out with costs.